ANNEX B TO
BRIEFING NOTE
DATED 7 AUGUST, 1992

774/91

COURT OF APPEAL FOR ONTARIO

Lacourcière, Krever and McKinlay JJ.A.

B E T W E E N:	
GRAHAM HAIG and JOSHUA BIRCH Respondents (Appellants in Cross-Appeal)	*Barbara A. McIsaac, Q.C.* for the appellants
- and -	*Philip A. MacAdam* for the respondents
HER MAJESTY THE QUEEN IN RIGHT OF CANADA and THE MINISTER OF JUSTICE OF CANADA Appellants (Respondents in Cross-Appeal)	*William Pentney* for the intervener
- and -	
CANADIAN HUMAN RIGHTS COMMISSION Intervener	Heard: January 30 & 31, 1992

KREVER J.A.

This is an appeal by the Attorney General of Canada from the judgment of Mr. Justice F.J. McDonald, dated September 23, 1991, declaring that the absence of sexual orientation from the list of proscribed grounds of discrimination in s.3 of the *Canadian Human Rights Act*, R.S.C. 1985, c.H-6, is discriminatory as being contrary to the guarantee of equal benefit of the law set out in s.15 of the *Constitution Act, 1982*. He also ordered that his decision be stayed for a period

of six months or until an appeal had been heard, within which time the existing legislation would remain in full force and effect. At the opening of the appeal an order was made on consent extending the stay until the disposition of the appeal. It was also common ground that the decision of the Supreme Court of Canada in *Schachter v. Canada*, then pending in that court, would very likely have a direct bearing on the outcome of this appeal. Judgment in the *Schachter* case was delivered on July 9, 1992.

The constitutional issue to be determined in this appeal is made clear against the background of the facts as they relate to the case of the respondent Birch, one of the applicants before McDonald J. His unchallenged evidence was that he is a homosexual and had a career in the Canadian Armed Forces from February, 1985 to April, 1990. In October, 1989, at a time when he held the rank of captain, he informed his commanding officer that he was homosexual. Shortly after this disclosure, Captain Birch was told by his commanding officer that he was subject to the application of the Canadian Armed Forces' policy directive relating to homosexuals in the Forces and would therefore cease to be eligible for promotions, postings or further military career training. In his affidavit supporting the application in the Ontario Court, General Division, he swore that, after working under these new career

restrictions for approximately two weeks, he felt so humiliated and stigmatized that he could no longer bring himself to work under those conditions, and that, but for the absence of sexual orientation as a proscribed ground of discrimination for the purposes of the *Canadian Human Rights Act*, he would have filed a complaint against the Canadian Armed Services with the Canadian Human Rights Commission, alleging discrimination against him on the basis of sexual orientation. Captain Birch was subsequently released from the Forces on medical grounds which stated that, because he was not able to work under the career restrictions imposed on him by the policy, he was unfit for further employment with the Canadian Armed Forces.

Evidence, in the form of affidavits filed on the application, discloses that homosexual men and women, referred to in the material as gays and lesbians, perceive that they are the objects of invidious discrimination in our society. There was also uncontradicted expert evidence from Dr. Barclay D. Johnson, an Assistant Professor in the Department of Sociology and Anthropology at Carleton University, expressing the opinion that empirical evidence demonstrates that homosexual persons are socially disadvantaged. His conclusion, based upon work of sociologists relating to prejudice and discrimination toward homosexual persons, was that homosexual persons in Canada are

an historically disadvantaged group and, in a very real sense, are a "discrete and insular minority" group. It is difficult to imagine a clearer case of invidious discrimination in employment by reason only of sexual preference than the experience of the respondent Birch referred to above. Also before McDonald J. on the application was evidence of the commitment of successive recent Ministers of Justice to the enactment of legislation amending the *Canadian Human Rights Act* by adding sexual orientation as a prohibited ground of discrimination in s.3. Finally by way of factual background for present purposes, it may not be unreasonable to infer that discrimination against homosexual persons has been recognized as a social problem in Canada from the fact that human rights Acts and Codes of six jurisdictions include sexual orientation as a prohibited ground of discrimination. Those jurisdictions are Yukon Territory, Manitoba, Ontario, Quebec, New Brunswick and Nova Scotia.

The parties appear to agree that the precise effect of Mr. Justice McDonald's judgment and reasons for judgment is not clear. They incline to the view that he held that, as a result of s.52 of the *Constitution Act, 1982*, s.3 of the *Canadian Human Rights Act*, and owing to its central role in the Act, the Act as a whole, are inoperative. I agree that the entire purpose and effect of the Act would be frustrated by the

declaration that s.3 is inoperative The appellant seeks to have the judgment set aside on the ground that McDonald J. erred in law in concluding that s.3 of the *Canadian Human Rights Act* violates s.15 of the *Canadian Charter of Rights and Freedoms*, which of course, is part of the *Constitution Act, 1982*. The respondents cross-appeal and ask that the judgment be varied to include (1) a declaration that homosexuals are entitled to equal benefit and equal protection of the *Canadian Human Rights Act* and (2) a declaration that homosexuals are entitled to seek and obtain redress against discrimination on the ground of sexual orientation from the Canadian Human Rights Commission. The Commission, as intervener, submits that the cross-appeal should be allowed and the judgment in appeal be varied to make explicit the declaration that s.3 of the Act is contrary to s.15 of the *Charter* and therefore inoperative pursuant to s.52 of the *Constitution Act, 1982*, but that the operation of the judgment be stayed for six months. It further submits that the judgment be varied by an order directing the Commission to administer the Act so as to conform to the *Charter* by taking and dealing with complaints on the basis of sexual orientation.

The remedial nature of the *Canadian Human Rights Act* is made clear by s.2 of the Act which describes its purpose in the following terms:

> The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

To achieve its purpose, the Act creates the Canadian Human Rights Commission and machinery for investigation, conciliation, settlement and sanctions against discriminatory practices on a prohibited ground of discrimination, in such matters as the provision of goods, services, facilities or accommodation and employment. Under s.40(1) of the Act, any individual or group of individuals, having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice, may file a complaint with the Commission. It is the complaint, then, that triggers the remedial provisions of the Act. But a valid complaint may only be made on a prohibited ground of discrimination. Section 3 of the Act does not list discriminatory practices based on sexual orientation. The only prohibited grounds expressed in the Act are those listed in s.3(1) which reads as follows:

> For all purposes of this Act, race, national or ethnic original, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

It is thus readily apparent that the effectiveness of this remedial legislation depends on the validity of s.3, the impugned section in this case. The principal issue dividing the parties is, of course, whether the absence from the list of sexual orientation causes the section, and therefore the application of the Act, to be invalid by reason of its contravention of s.15(1) of the *Canadian Charter of Rights and Freedoms*, which is in the following terms:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 52(1) of the *Constitution Act, 1982* provides that:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The final relevant provision of the *Charter* for present purposes is found in s.24(1):

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Section 15(1) of the *Charter* does not, in express terms, include sexual orientation as a basis of discrimination against which constitutional protection is guaranteed as integral to equality before and under the law and equal protection and benefit of the law. It is now clear that s.15(1) of the *Charter* provides protection not only to the enunciated grounds but also to grounds that are analogous to them: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. Courts in Canada have acted on the premise that sexual orientation is an analogous ground or is a ground covered by s.15 of the *Charter*. In *Vesey v. Correctional Services of Canada* (1990), 109 N.R. 300, at p.304, the Federal Court of Appeal pointed out that in that appeal counsel for the Commissioner of Correctional Service of Canada "has formally informed us that it is the position of the Attorney General of Canada that sexual orientation is a ground covered by s.15 of the *Charter*." At first instance in that case, [1990] 1 F.C. 321, no such concession had been made but Dubé J., at p.329,

nevertheless had held that "sexual orientation is not a prohibited ground listed under s.15 but, in my view, it is an analogous ground recognized by the above provincial and territorial human rights acts, as well as the House of Commons Parliamentary Committee on Equality Rights."

In *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356, Madam Justice Rowles held that the failure of the regulations under the *Medical Service Act*, R.S.B.C. 1979, c.255, to include in the definition of "spouse" two persons living in a homosexual relationship, thus denying to homosexual couples medical services plan coverage available to heterosexual couples, infringed homosexual couples' rights to equality under s.15(1) of the *Charter*. In the course of her reasons she said, at p.371:

> Although s.15 does not include sexual orientation as one of the enunciated grounds, Mr. Pearlman [counsel for the Medical Services Commission], on behalf of the respondents, has conceded that discrimination based on sexual orientation contravenes the equality provisions of the *Charter*. That concession is consistent with the decision of our court in *Brown v. British Columbia (Minister of Health)*, 42 B.C.L.R. (2d) 294 at 309-10, 66 D.L.R. (4th) 444, 48 C.R.R. 137 (S.C.).

Finally on this issue, on the argument of this appeal Ms. McIsaac expressly conceded that sexual orientation is an

analogous ground for the purposes of this case but added that this question is one of law. I agree and add that, as a matter of law, the concession is right. No further analysis of this point need be undertaken.

Ms. McIsaac correctly pointed out that the determination that sexual orientation is an analogous ground, and is therefore included in the protection extended by s.15(1) of the *Charter*, does not end the matter and, more particularly, that it does not mean that s.3(1) of the *Canadian Human Rights Act* offends s.15(1) of the *Charter*. A violation of s.15(1) requires the existence of discrimination. In ***Andrews v. Law Society of British Columbia***, *supra*, at p.182, McIntyre J. said:

> ... However, in assessing whether a complainant's rights have been infringed under s.15(1), it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s.15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s.15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.

The appellant's submission is that although sexual orientation is an analogous ground under s.15(1), in failing to include it as a proscribed basis of discrimination in s.3(1) of the *Canadian Human Rights Act*, Parliament has not itself acted in a discriminatory fashion under s.15(1) of the *Charter*. Mr. Justice McIntyre put it this way in *Andrews v. Law Society of British Columbia*, *supra*, at p.182:

> A complainant under s.15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.

Parliament, it is further argued, could have chosen not to have a human rights Act and, having chosen to enact one, was free to legislate in respect of some social problems and not others.

The most authoritative definition of discrimination in the context of s.15(1) of the *Charter* is that found in the judgment of McIntyre J. in *Andrews v. Law Society of British Columbia*, *supra*, at pp.174-75:

> ... I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect

of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

... In general, it may be said that the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s.15(1). Certain differences arising from the difference between the *Charter* and the Human Rights Act must, however, be considered. To begin with, discrimination in s.15(1) is limited to discrimination caused by the application or operation of law, whereas the Human Rights Acts apply also to private activities. Furthermore, and this is a distinction of more importance, all the Human Rights Acts passed in Canada specifically designate a certain limited number of grounds upon which discrimination is forbidden. Section 15(1) of the *Charter* is not so limited. The enumerated grounds in s.15(1) are not exclusive and the limits, if any, on grounds for discrimination which may be established in future cases await definition. The enumerated grounds do, however, reflect the most common and probably the most socially destructive and historically practised bases of discrimination and must, in the words of s.15(1), receive particular attention. Both the enumerated grounds themselves and other possible grounds of discrimination recognized under s.15(1) must be interpreted in a broad and generous manner, reflecting the fact that they are constitutional provisions not easily repealed or amended but intended to provide a "continuing framework for the legitimate exercise of governmental power" and, at the

same time, for "the unremitting protection" of equality rights: see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p.155.

A comparison of the prohibited grounds of discrimination in s.3(1) of the *Canadian Human Rights Act* with the grounds listed in s.15(1) of the *Charter* reveals that all those who have complaints about discrimination on the grounds listed in s.15(1) of the *Charter* have the benefit of access to the ameliorating procedures of the *Canadian Human Rights Act*. Homosexual persons, who fall within a ground analogous to the constitutionally protected ground of sex, are, by exclusion, denied access. Because of the omission of that ground of discrimination, the *Canadian Human Rights Act* withholds benefits or advantages available to other persons alleging discrimination on the enumerated grounds from persons who are and, on the evidence, have historically been, the object of discrimination on analogous grounds. The distinction created by the legislation alone, however, is not sufficient to justify a conclusion of discrimination within the meaning of s.15(1) of the *Charter* and of *Andrews v. Law Society of British Columbia, supra*. The larger context, social, political and legal, must also be considered. In the words of Wilson J., speaking for a unanimous Supreme Court of Canada in *R. v. Turpin*, [1989] 1 S.C.R. 1296, at pp.1331-2:

> In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context. McIntyre J. emphasized in *Andrews* (at p.167):
>
> > For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions.
>
> Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.

One need not look beyond the evidence before us to find disadvantage that exists apart from and independent of the legal distinction created by the omission of sexual orientation as a prohibited ground of discrimination in s.3(1) of the *Canadian Human Rights Act*. The social context which must be considered includes the pain and humiliation undergone by homosexuals by reason of prejudice towards them. It also includes the enlightened evolution of human rights social and

legislative policy in Canada, since the end of the Second Worl War, both provincially and federally. The failure to provid an avenue for redress for prejudicial treatment of homosexua members of society, and the possible inference from th omission that such treatment is acceptable, create the effec of discrimination offending s.15(1) of the *Charter*.

The appellant expressly disavows reliance on s.1 c the *Charter* as supporting the validity of s.3(1) of th *Canadian Human Rights Act* if it should be held to violate s.1 of the *Charter*. As a result, the denial to homosexual person of the equal protection and equal benefit of the law withou discrimination by reason of the denial to them of access to th remedial provisions of the *Canadian Human Rights Act* must b held to be unjustified in a free and democratic society. The issue raised by that conclusion is that of the appropriate judicial remedy to be given.

The task of choosing the appropriate remedy for benefit-conferring, underinclusive statutory provision tha violates a Charter right in a way that cannot be justified ha been made vastly easier by the decision of the Supreme Court c Canada in *Schachter v. Canada*, *supra*. That case is factuall distinguishable. It was concerned with discriminatic resulting from the eligibility for unemployment insuranc

benefits of adoptive parents but not of natural parents. Nevertheless, the judgment of the court provides guidelines for the remedy to be chosen for unconstitutional benefit-conferring, underinclusive legislation and it is to the guidance of that case that I now turn.

The two relevant provisions of the *Constitution Act, 1982* for this exercise are, of course, sections 24(1) and 52(1), both of which are reproduced above, but for convenience I reproduce them again:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

It follows from Chief Justice Lamer's analysis in *Schachter* that the governing provision in a case such as this is s.52(1) and not s.24(1). Section 24(1) is relevant in cases in which a particular action taken infringes a person's *Charter* rights. Section 52(1), on the other hand, is the appropriate provision in cases in which a law itself is held to be unconstitutional. Lamer C.J.C. adds, at p.44 of his reasons,

that an "individual remedy under s.24(1) of the *Charter* will rarely be available in conjunction with action under s.52 of the *Constitution Act, 1982*." It is, therefore, s.52(1) to which attention must be given in this appeal.

As Chief Justice Lamer points out, there are five remedies available under s.52. The difficult task and, in my view, the principal issue in the appeal is to select the appropriate one. They are:

1. striking down,
2. severance,
3. striking down or severance and temporarily suspending the declaration of invalidity, the remedy selected by McDonald J. in this case,
4. reading down, and
5. reading in.

Given the pivotal role played by s.3(1) of the *Canadian Human Rights Act* in the scheme of the Act as a whole, in practical terms to sever it from the remainder of the Act would be to strike down the entire Act. Because the defect is the absence of a ground of discrimination, reading down is an unrealistic option. We are thus left with the necessity of choosing among striking down s.3(1) by declaring it to be of no force or effect, striking down s.3(1) but temporarily suspending the

declaration of invalidity to permit Parliament to repair the defect, and reading into s.3(1) sexual orientation as a further prohibited ground of discrimination.

A further refinement may be made. Striking down alone would provide the respondents with a pyrrhic victory. They would gain no access to legislative machinery intended to be remedial. Moreover, it would deny access to large numbers of other persons already intended by Parliament to have access to the benefit of the Act. As Chief Justice Lamer pointed out, at pp.44-45 of his reasons, the right to equal benefit of the law is a positive right:

> Cases involving positive rights are more likely to fall into the remedial classifications of reading down, reading in or striking down and suspending the operation of the declaration of invalidity than to mandate an immediate striking down.... For a court to deprive persons of a constitutionally guaranteed right by striking down underinclusive legislation would be absurd.

In my view, the choice must be between striking down and suspending temporarily the declaration of invalidity and reading in. That determination requires the application of the guidelines given by *Schachter v. Canada*. The twin guiding principles are respect for the role of the legislature and the

purposes of the *Charter* and in deciding among remedies, the one chosen should constitute the lesser intrusion into the legislative domain. Put another way, the remedy chosen must not only respect the role of the legislature but it must also promote the purposes of the *Charter*. In choosing the remedy one must look to the values and objectives of the *Charter*, because an appreciation of the *Charter*'s deeper social purposes is central to the determination of remedy, especially when the impugned legislation confers a benefit on disadvantaged groups.

The first step in the determination whether reading in is appropriate is to define the extent of the inconsistency between the right to the equal protection and equal benefit of the law guaranteed by s.15(1) of the *Charter* and s.3(1) of the *Canadian Human Rights Act*. The inconsistency is the omission of sexual orientation from the prohibited grounds of discrimination in s.3(1) of the Act. At pp.14-15 of his reasons Lamer C.J.C. said:

> Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme.

He points out, however, that since the role of the legislature is to be respected, the court should not read in in cases where

there is no manner of extension which flows with sufficient precision from the requirements of the Constitution. In this case, the definition of the extent of the inconsistency is easily capable of being determined with precision: the omission of the words "sexual orientation" from s.3(1) of the *Canadian Human Rights Act*.

The next consideration is the impact of the available remedies on the objectives of the legislation in question, for the remedy to be selected must constitute the least possible interference with that legislative objective. If reading in would result in a greater interference with the legislative objective than striking down, it would not be appropriate. It would, however, be appropriate if it enhances the legislative objective more than striking down would do. Finally, it would be an unwarranted intrusion into the province of the legislature if reading in would bring about a result that is manifestly contrary to the legislative objection. A mere reading of s.2 of the *Canadian Human Rights Act*, set out above, discloses that to read into s.3(1) the words "sexual orientation" would be less intrusive than the total destruction of the objective that would result from striking the provision down. Reading in not only leaves the purpose of the Act intact but it enhances it by making it conform to *Charter* values.

Budgetary impact of the proposed remedy is another important consideration in the Supreme Court of Canada's guidelines. The *Schachter* case was itself a case in which the remedy of reading in directly affected the consolidated revenue fund because it would have resulted in the payment of money to a category of persons not otherwise entitled to payment by the terms of the legislation. It was held that reading in would be inappropriate if it involved an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question. It is true that extending the protection of the *Canadian Human Rights Act* to persons who complain of discrimination because of their sexual orientation may well increase expenditures by reason of additional investigation, proceedings and perhaps Commission staff. Although there is no estimate in the evidence before us of this possible increased budgetary burden, it is, I think, safe to assume that it cannot be so great as substantially to change the nature of the legislative scheme created by the Act.

The guidelines also require that one consider whether reading in results in an impermissible intrusion into the legislative realm by asking whether the significance of the remaining portion is so markedly changed that it would be unsafe to assume that the legislature would have passed it. If it were unsafe to assume that Parliament would have enacted the

protection to categories of persons enunciated in s.3(1) of the *Canadian Human Rights Act* if sexual orientation were to be included, the section would have to be struck down. The relative size of the two relevant groups is a significant factor in this determination. At p.33 of his reasons Chief Justice Lamer said:

> Where the group to be added is smaller than the group originally benefitted, this is an indication that the assumption that the legislature would have enacted the benefit in any case is a sound one. When the group to be added is much larger than the group originally benefitted, this could indicate that the assumption is not safe. This is not because of the numbers *per se*. Rather, the numbers may indicate that for budgetary reasons, or simply because it constitutes a marked change in the thrust of the original program, it cannot be assumed that the legislature would have passed the benefit without the exclusion....

In this case the group to be added is significantly smaller than the group now benefitting. Given the evidence in the material before the court on this application of the commitment of successive Ministers of Justice on behalf of their governments to amend the legislation to add sexual orientation to the list of prohibited grounds of discrimination, it is surely safe to assume that Parliament would favour extending the benefit of s.3(1) of the Act to homosexual persons over nullifying the entire legislative scheme.

The final consideration in the guidelines is put this way in the reasons of Lamer C.J.C., at p.34:

> It is sensible to consider the significance of the remaining portion when asking whether the assumption that the legislature would have enacted the remaining portion is a safe one. If the remaining portion is very significant, or of a long standing nature, it strengthens the assumption that it would have been enacted without the impermissible portion.

and at p.36:

> ... The fact that the permissible part of a provision is encouraged by the purposes of the Constitution, even if not mandated by it, strengthens the assumption that the legislature would have enacted it without the impermissible portion.

As I have already pointed out, enlightened human rights legislative policy has evolved in this country. It is now an integral part of our social fabric. It is therefore inconceivable to me that Parliament would have preferred no human rights Act over one that included sexual orientation as a prohibited ground of discrimination. To believe otherwise would be a gratuitous insult to Parliament. This last consideration, then, also suggests the remedy of reading in. Moreover, none of the criteria to be considered by the *Schachter* guidelines suggests otherwise.

Despite this last conclusion, a word must be said about the option of a declaration of invalidity coupled with a temporary stay. As Chief Justice Lamer emphasized in his reasons in *Schachter*, at p.38, "the question of whether to delay the effect of a declaration is an entirely separate question from whether reading or nullification is the appropriate route under s.52." Such a course of action, as he goes on to point out at p.39, is "a serious interference in itself with the institution of the legislature. Where reading in is appropriate, the legislature may consider the issue in its own good time and take whatever action it wishes. Thus delayed declarations of nullity should not be seen as preferable to reading in in cases where reading in is appropriate." That is the appropriate remedy in this case.

For these reasons, I would vary the order of McDonald J. by substituting for it an order declaring that the *Canadian Human Rights Act*, R.S.C. 1985, c.H-6 be interpreted, applied and administered as though it contained "sexual orientation" as a prohibited ground of discrimination in s.3 of that Act. In all other respects, I would dismiss the appeal with costs to the respondents. The cross-appeal should be allowed but, in the circumstances and in view of the fact that McDonald J. did not have the guidance of the judgment of the Supreme Court of

Canada in *Schachter v. Canada*, without costs. The intervener did not ask for, and should not receive, costs.